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Nos. 83-321 & 83-322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GUY WALLER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

CLARENCE COLE, *et al.*,

Petitioners,

v.

STATE OF GEORGIA,

Respondent.

ON WRITS OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF GEORGIA

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE LEGAL FOUNDATION OF AMERICA, IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

Whether the Georgia Racketeer Influenced and Corrupt Organizations Act (O.C.G.A. § 16-14-7(f)) facially violates the Fourth and Fourteenth Amendments to the United States Constitution, by delegating to police officers executing a search warrant unbridled discretion to search for and seize anything they choose to seize, and whether the searches and seizures, as conducted in this case under the authority of that statute, were unconstitutionally general.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutory Materials

Articles

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This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Counsel for

petitioners and the respondent, and letters of consent of the parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. (AELE), as a national not-for-profit citizens organization is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* fifty-six times in the Supreme Court of the United States, and thirty-three times in other courts, including the U.S. District and Courts of Appeals and the Supreme Courts of California, Illinois, Ohio and Missouri.

THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC. (IACP) is the largest organization of police executives and administrators in the world, consisting of more than 14,000 members in 75 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to improve the delivery of vital police services, while at the same time protecting the rights of all citizens.

THE LEGAL FOUNDATION OF AMERICA (LFA) is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. The Foundation's attorneys have previously appeared as *amicus curiae* in this Court to urge this view. All litigation undertaken by the Foundation is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees and is supported by grants from the public.

Amici's specific interest in the instant case arises from our concern that the statute in question, which is a state RICO (Racketeer/Influenced and Corrupt Organizations Act) statute patterned in part after the federal RICO statute, will be limited or abrogated. We believe that the statute fully comports on its face with the probable cause, particularity and reasonableness requirements of the Fourth Amendment, and that the search conducted in the instant case factually conformed to the requirements of the Fourth Amendment.

We bring to the attention of the Court that such statutes are a centrally important tool in the arsenal of state and federal law enforcement agencies in the fight against the spreading cancer of organized crime in our society. As noted by Professor G. Robert Blakey of the University of Notre Dame Law School, an eminent legal scholar and authority on the subject, such statutes are essential "... in rooting out patterns of organized crime, gang activity, and other schemes which have proven difficult to prosecute." "*Proposed State RICO Bill Opposed by CBA*," Chicago Daily Law Bulletin, Chicago, Illinois, October 31, 1983, p. 1. Without such statutes the efforts of the states to cope with organized crime would be crippled beyond repair.

STATEMENT

Petitioners were indicted and convicted on charges of violation of the Georgia Racketeer Influenced and Corrupt Organizations Act.

The facts in the record show that between June, 1981, and January, 1982, petitioners participated in a gambling organization which conducted a lottery based on the daily stock and bond volume on the New York Stock Exchange. This "lottery" was conducted in the metropolitan Atlanta area. Gambling information was transmitted by electronic means and stored in a micro-computer maintained by one of the petitioners.

In the courts below, *inter alia,* the petitioners made a facial attack upon O.C.G.A. § 16-14-7(f). The Supreme Court of Georgia, however, held that:

> A seizure under this section is allowed only in carefully prescribed circumstances. The seizure must be incident to a lawful arrest, search or inspection, and the officer must have probable cause to believe that the property is subject to forfeiture or that the property will be lost or destroyed if not seized. There is no Fourth Amendment problem with the seizure of the fruits of a lawful search or inspection. The statute on its face provides that the search or inspection must be lawful. This requires that the search be pursuant to a warrant, incident to a lawful arrest, or in the presence of other exigent circumstances, which would render the search or inspection "lawful." By definition, therefore, the statute complies with the Fourth Amendment.
> *Waller et al.* v. *State,* 251 Ga. 124, 303 S.E. 2d at 440.

Additionally, the Georgia Court ruled that the statute was constitutionally applied and that if some evidence seized outside the warrant was properly suppressed there was no basis for suppressing other evidence that had been properly seized.

The Georgia Court also ruled that the petitioners' Sixth Amendment right to a public trial was not violated when the trial court closed a suppression hearing after concluding that closure was necessary to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and to further the administration of justice. *Amici* do not address this issue since it is outside the scope of our respective organizations' interests.

SUMMARY OF ARGUMENT

O.C.G.A. § 16-14-7(f) is facially valid because seizures are allowed only in carefully prescribed circumstances, i.e., incident to a lawful arrest, search or inspection, and a police officer must

possess probable cause to believe that the property is subject to forfeiture or will be lost or destroyed if not seized. This conforms to the requirements of the Fourth Amendment. Seizure of contraband, evidence, or weapons not listed in a search warrant by a police officer executing an arrest or search warrant does not violate the Due Process Clause of the Fourteenth Amendment even in the absence of notice and hearing. The seizure in the instant case comported with the statute and the evidence was properly held admissible. The forfeiture statute in question is essential to state law enforcement interests in mounting an effective campaign against organized crime activities that are difficult to control through conventional criminal code charges.

ARGUMENT

THE STATUTE IS FACIALLY VALID UNDER THE FOURTH AMENDMENT BECAUSE IT SPECIFICALLY PROVIDES THAT THE SEARCH OR INSPECTION MUST BE LAWFUL, THERE IS CLEARLY A REQUIREMENT THAT THE SEARCH BE MADE EITHER PURSUANT TO A WARRANT, INCIDENT TO A LAWFUL ARREST, OR UNDER OTHER EXIGENT CIRCUMSTANCES WHICH WOULD RENDER THE SEARCH OR INSPECTION LAWFUL, AND THE SEARCH CONDUCTED IN THIS CASE CONFORMED TO FOURTH AMENDMENT REQUIREMENTS.

Amici will not reiterate the legal arguments made by the respondent in this case, although we are in accord with such arguments and wish to associate ourselves and express our support for them. We confine ourselves to the policy aspect of the statute and the Fourth Amendment issues raised by it.

The pertinent portion of the statute, which is an integral part of the Georgia RICO forfeiture statute, provides:

> (f) Seizure may be effected by a law enforcement officer authorized to enforce the penal laws of this state prior to the filing of the complaint and without a writ of seizure if the seizure is incident to a lawful arrest, search, or inspection and the officer has probable cause to believe the property is subject to forfeiture and will be lost or destroyed if not seized. Within ten days of the date of seizure, the seizure shall be reported by the officer to the district attorney of the circuit in which the seizure is effected; and the district attorney shall, within 30 days of receiving notice of seizure, file a complaint for forfeiture. The complaint shall state, in addition to the information required in subsection (e) of this Code section, the date and place of seizure.
>
> O.C.G.A. § 16-14-7(f).

As noted, this subsection is part of a detailed, specific statutory procedure for seizure and forfeiture of property used

in organized crime activities. It sets forth four specific conditions precedent to the seizure of property.

The first condition is that the seizure be made by a law enforcement officer authorized to enforce the penal laws of Georgia. There can be no constitutional complaint with this condition.

The second requires that the seizure be made incident to a lawful (1) arrest, (2) search, or (3) inspection. The use of the term "lawful" in describing the attendant arrest, search or inspection is clearly in compliance with the Fourth Amendment and gives clear direction to a law enforcement officer that his or her conduct must comport with the requirements of the Fourth Amendment.

A third requirement is that the seizing officer must have probable cause to believe that the property is subject to forfeiture as provided in another subsection of the statute, O.C.G.A. § 16-14-7(a), and he may then seize the evidence which is in plain view.

This probable cause requirement for seizure of evidence in plain view was endorsed by the United States Supreme Court last Term in the case of *Texas* v. *Brown*, ____ U.S. ____, 103 S.Ct. 1535 (1983). After noting the rule that if a police officer is in a place where he has a constitutional right to be, such as pursuant to a lawful arrest, search or inspection, and he has probable cause to believe that an object or substance falling into plain view is contraband or evidence, he can seize it without further authority, the Court stated:

> "plain view" provides grounds for seizure of an item when an officer's access to an object has some prior justification under the Fourth Amendment. "Plain view" is perhaps better understood, therefore, not as an independent "exception" to the warrant clause, but simply as an extension of whatever the prior justification for an officer's "access to an object" may be. . . .

> The principle is grounded on the recognition that when a police officer has observed an object in "plain view," the owner's remaining interests in the object are merely those of possession and ownership . . . Likewise, it reflects the fact that requiring police to obtain a warrant once they have obtained a first-hand perception of contraband, stolen property or incriminating evidence generally would be a "needless inconvenience," . . . that might involve danger to the police and public. . . . We have said previously that "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on . . . Fourth Amendment interests against its promotion of legitimate governmental interests." . . . In light of the private and governmental interests just outlined, our decisions have come to reflect the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately. . . . This rule merely reflects an application of the Fourth Amendment's central requirement of reasonableness to the law governing seizures of property.
>
> ____ U. S. at ____, 103 S. Ct. at 1540-41. (footnotes and authorities omitted).

The Court also stated in *Payton* v. *New York*, 445 U. S. 573 (1980) at 587 that "[t]he seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." In addition to the association with criminal activity, an association with activity leading to a statutory forfeiture of property is also within the purview of the plain view doctrine, see, *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 679 (1974), and such seizure without prior notice and a hearing does not offend due process ("... in limited circumstances [identified as including the necessity to secure an important governmental or societal interest], immediate seizure of a property interest, without an opportunity for prior hearing, is constitutionally permissible"). Thus, an officer who is executing a valid arrest warrant or a valid search warrant may seize contraband, evidence of a crime, weapons or

items subject to statutory forfeiture under the prescribed circumstances, without these items necessarily being listed in the search warrant.

The fourth and final requirement set forth by the statute is that the officer have probable cause to believe that the property will be lost or destroyed if not seized. In essence, this is an "exigent circumstances" requirement that has been recognized by this Court in various settings, including the automobile exception created in *Carroll* v. *United States*, 267 U. S. 132 (1925) and subsequently followed in *Chambers* v. *Maroney*, 399 U. S. 42 (1970) and *United States* v. *Ross*, 456 U. S. 798 (1982) and other cases, and also in situations involving "hot pursuit", *Warden* v. *Hayden*, 387 U. S. 294 (1967), and searches incident to arrest, *Chimel* v. *California*, 395 U. S. 752 (1969) and *New York* v. *Belton*, 453 U. S. 454 (1981).

In summary, these four conditions precedent do not violate the Fourth Amendment to the United States Constitution and subsection (f) is clearly constitutional on its face.

Additionally, the petitioners contend that the Georgia court should have suppressed all evidence seized rather than only that evidence which it was concluded had been improperly seized. The argument apparently is that this was a general search and everything seized should be suppressed pursuant to the exclusionary rule. *Amici* can only note that the proposed application of the rule is novel and without foundation in the precedents of this Court. The cases that have been cited by the petitioners for this proposition, *Marron* v. *United States*, 275 U. S. 192 (1927), *United States* v. *LaVallee*, 391 F. 2d 123 (2nd Cir. 1968), and *United States* v. *Pinero*, 329 F. Supp. 992 (S. D. N. Y. 1971), do not support it, but stand only for the proposition that particular evidence improperly seized is not admissible, a straight-forward application of the exclusionary rule. As the Supreme Court of Georgia noted in 303 S. E. 2d at

440, "[t]here is no requirement that where evidence has been lawfully seized it must be suppressed if officers unlawfully seized other material, unless the unlawfully seized evidence led to discovery of the evidence which was admitted." There being no fruit of the poisonous tree or derivate evidence aspect to the petitioners' case, this contention should be rejected as groundless.

Amici submit that an equally important concern in this case is law enforcement's—and ultimately Society's— interest in the *type of statute under evaluation.*

The statute is not penal in nature and, in fact, the forfeiture proceedings contemplated by it are civil and governed by the Georgia Civil Practice Act. Not merely fruits of a crime or contraband, but *any* "personal property realized through or derived from [organized] crime" may be seized and subjected to forfeiture. *Western Business Systems, Inc.* v. *Slaton*, 492 F. Supp. 513, 514 (N. D. Ga. 1980) ("We must keep in mind that these objects may be anything.")

State legislatures are turning to RICO statutes similar to Georgia's as an alternative to traditional criminal penal code sanctions for dealing with organized crime. The reasons are readily apparent. As noted by Professor Blakey, traditional law enforcement methods are hampered by organized crime's especially skillful and practiced arts of secrecy, deception and in some cases, corruption of public officials. See, Blakey, "*The RICO Civil Fraud Action in Context: Reflections on Bennet* v. *Berg*", 58 Notre Dame L. Rev. 237 (1982), and others, Weiner, "*Crime Must Not Pay: RICO Criminal Forfeiture in Perspective*", 1981 N. Ill. U. L. Rev. 225. Such conventional methods are not eminently successful in dealing with organized crime, but actions which can dismantle the property holdings of this illicit empire strike at the heart of its domain—the pocketbook.

This Court recognized and approved of this principle just a few short months ago when it unanimously held in *Russello* v.

United States, ____ U. S. ____, 104 S. Ct. 296, 302 (1983), that the forfeiture provisions of the federal RICO statute (18 U. S. C. § 1963(a)(i)) include the *profits and proceeds* of enterprises, in other words, *all forms of real and personal property derived from racketeering.* ("The legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots").

Amici as professional organizations representing state and local law enforcement entities on the front line in the uneven battle against organized crime, respectfully request the Court to extend the rationale of *Russello* to similar state efforts represented by the Georgia statute at bar. We would never ask this Court to approve any such state statute that did not—at the same time—comport with the undiluted requirements of the Fourth Amendment. The Georgia statute simply does not offend that Amendment in any of its particulars. It *does*, however, provide an effective weapon to continue the fight in state forums against this blight. We ask the Court to again add its unanimous voice to that commendable cause by unequivocally approving the type of statute involved in this case and the admissibility of the evidence derived from the seizure made by the law enforcement officers pursuant to the Georgia statute.

CONCLUSION

Amici respectfully submit that the decision of the Supreme Court of Georgia should be affirmed on the facts and the law, and on the basis of sound judicial and public policy.

Respectfully submitted,

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